LEONG WENG CHOON

v.

CONSOLIDATED LEASING (M) SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
KC VOHRAH J
MOHD NOOR AHMAD J
[CIVIL APPEAL NO: P-02-271-1994]
4 JUNE 1998

CONTRACT: *Guarantee - Guarantor - Liability of - Whether liability could be attached to the guarantor*

CONTRACT: *Guarantee - Indemnification - Whether there was a claim against the guarantor*

CONTRACT: *Repudiation - Acceptance - Whether there was acceptance - Contracts Act 1950, s. 40*

HIRE PURCHASE: *Breach of argeement - Failure to pay instalments - Whether such failure amounted to termination of agreement - Liability of hirer in case of failure to pay instalments - Hire Purchase Act 1967, s. 15*

By a hire purchase agreement dated 25 February 1985, the owner (plaintiff/ respondent) let to the hirer (first defendant) a luxury air-conditioned bus. By a guarantee and indemnity in writing also dated 25 February 1985 the appellant guaranteed the payment of all sums of money at any time due by the first defendant to the respondent.

The first defendant defaulted on the payment of the monthly rentals. The respondent then sent a notice indicating an intention to repossess the vehicle. However, unknown to the respondent at the time, the bus had been seized a month earlier by customs officials for being used as a vehicle to smuggle tin ore into Malaysia. As it was a futile exercise, the respondent did not take further action to repossess the bus. The bus was subsequently confiscated.

In the action against the first defendant, the respondent obtained judgment against the appellant. In the statement of claim the respondent stated that the first defendant had breached the terms of the agreement and it was thereby terminated. It was also stated that the first defendant had also breached the agreement when the bus was confiscated. The respondent argued that the appellant had agreed to indemnify the respondent against any loss that the respondent might sustain as a result of the venture.

Held:
Per NH Chan JCA

[1] Even if the first defendant had repudiated the agreement in its entirety by refusing to pay all further rentals, that would not have terminated the agreement. This was because according to s. 40 of the Contracts Act 1950 ('the CA'), only the respondent could elect to treat the contract as at an end by accepting the repudiation and terminating the contract. The respondent could either accept the repudiation by terminating the agreement or it could ignore the breach by treating the contact as alive and subsisting. On the facts of the pleadings, the respondent did not terminate the contract despite the repudiation by the first defendant – so that the contact was still subsisting.

[2] Under the Hire Purchase Act 1967 ('the HPA'), the only way for the hirer to determine the agreement ahead of time, that was before all the instalments were paid up, was to return the bus to the respondent under s. 15 of the HPA. In this case, since it was not possible to return the bus to the respondent, the agreement could not have been terminated by the first defendant. The respondent's claim against the first defendant was unsustainable. Since the first defendant did not terminate the agreement by returning the bus, there was no liability of the hirer that was revealed in the statement of claim.

[3] Since the agreement was still subsisting, the respondent had the right to recover instalments due under the agreement. Unfortunately, there was no claim for arrears of instalments in its statement of claim. Therefore as the respondent did not claim for arrears of instalments against the first defendant, there was no liability of the first defendant for the appellant (guarantor) to make good under the terms of the guarantee.

[4] Furthermore in the statement of claim, there was no claim for the respondent to be indemnified by the appellant for the loss of the bus to the customs. Instead, the respondent pleaded a different cause of action which was unsustainable. In fact on this point, the respondent did not even try to make out such a case against the appellant.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Menurut suatu perjanjian sewa beli bertarikh 25 Februari 1985, pemiliknya (plaintif/responden) telah menyewakan kepada penyewa (defendan pertama) atas sewa beli, suatu bas mewah berhawa dingin. Menurut suatu gerenti dan tanggung rugi bertulis juga bertarikh 25 Februari 1985, perayu telah menggerenti bayaran kesemua wang yang dihutang oleh defendan pertama kepada responden.

Defendan pertama telah beringkar atas bayaran sewa bulanan. Responden kemudiannya telah menghantar notis menyatakan niatnya untuk mengambil kembali kenderaan tersebut. Walau bagaimanapun, responden telah tidak mengetahui bahawa pada masa itu, bas tersebut telah disita sebulan dahulu kerana ianya digunakan sebagai kenderaan untuk menyeludup timah ke Malaysia. Oleh kerana ianya merupakan suatu gerakan yang tidak berguna, responden telah tidak mengambil tindakan yang selanjutnya untuk mengambil kembali bas tersebut. Bas tersebut kemudiannya telah dirampas.

Diputuskan:
Oleh NH Chan HMR

[1] Jikapun defendan telah menolak perjanjian tersebut secara keseluruhan dengan keengganannya untuk membayar sewa selanjutnya, perjanjian tersebut masih tidak ditamatkan. Ini adalah kerana mengikut s. 40 Akta Kontrak 1950 ('AK'), hanya responden dapat melantik untuk menganggap kontrak tersebut sebagai tamat dengan menerima penolakan tersebut dan menamatkan perjanjian tersebut. Responden samada boleh menerima penolakan tersebut dengan menamatkan perjanjian tersebut ataupun ia boleh tidak mengendahkan pengingkaran dengan menganggap kontrak tesebut sebagai wujud dan bernyawa. Berdasarkan fakta-fakta pliding, responden telah tidak menamatkan kontrak walaupun terdapatnya penolakan oleh defendan pertama – dan oleh itu kontrak tersebut adalah masih wujud.

[2] Di bawah Akta Sewabeli 1967 ('AS'), cara tunggal untuk penyewa menamatkan perjanjian sebelum tempoh masa, iaitu sebelum kesemua ansurannya dibayar, adalah untuk mengembalikan bas kepada responden di bawah s. 15 AS. Dalam kes ini, oleh kerana ianya adalah mustahil untuk mengembalikan bas tersebut kepada responden, perjanjian tersebut tidak dapat ditamatkan oleh defendan pertama. Maka tuntutan responden terhadap defendan pertama tidak dapat dikekalkan. Oleh kerana defendan pertama telah tidak menamatkan perjanjian tersebut dengan mengembalikan bas tersebut, telah tidak terdapatnya tanggungan yang dapat diperlihatkan dalam pernyataan tuntutan.

[3] Oleh kerana perjanjian tersebut masih wujud, responden mempunyai hak untuk mendapat kembali ansuran yang wajar di bawah perjanjian tersebut. Malangnya, tidak terdapatnya tunggakan untuk ansuran dalam pernyataan tuntutan. Maka oleh kerana responden tidak menuntut tunggakan ansuran dari defendan pertama, tidak terdapatnya liabiliti defendan pertama untuk dipenuhi oleh perayu di bawah terma-terma gerenti tersebut.

[4] Lagipun, dalam pernyataan tuntutan, tidak terdapatnya tuntutan oleh responden untuk ditanggung rugi oleh perayu untuk kerugian bas tersebut kepada pihak kastam. Malah, responden telah memohon suatu kausa tindakan yang berlainan yang tidak dapat dikekalkan. Berkenaan dengan perkara ini, responden tidak cuba pun untuk membuktikan kes terhadap perayu.

[Rayuan dibenarkan.]

Case referred to:
Yeoman Credit Ltd v. Latter [1961] 2 All ER 294 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 40, 76, 77, 79
Hire Purchase Act 1967, ss. 15(1), (5)(c), (6), 16

For the appellant - Lim Chor Pee (Gannesh Ponniah with him); M/s Geh Cheng Lok & Co
For the respondent - Hoe Kek Pin; M/s Lim Cheng Poh, Lim & Rahim

Reported by Mariette Peters-Goh

JUDGMENT

NH Chan JCA:

This is an appeal by Leong Weng Choon (guarantor) from the judgment of the High Court at Penang given on 5 October 1994.

By a hire purchase agreement in writing dated 25 February 1985, the plaintiff (owner), the respondent in this appeal, let to Enterpol Travel & Tours Agencies (hirer), the first defendant, on hire purchase a luxury air-conditioned coach.

By a guarantee and indemnity in writing which was also dated 25 February 1985 and in consideration of the plaintiff entering into the said hire purchase agreement, the appellant guaranteed the payment of all sums of money at anytime due from or by the first defendant to the plaintiff (provided that the total amount recoverable should not exceed the purchase price of the bus together with the interest due and payable by the first defendant: see cl. 23 of the guarantee).

The first defendant breached the hire purchase agreement by defaulting on the payment of the monthly rentals. The last instalment was paid on 25 July 1985. The plaintiff then sent a notice dated 28 September 1985 which indicated its intention to reposses the vehicle. However, unknown to the plaintiff at the time, the bus had been seized a month earlier on 28 August 1985 by customs officials for being used as a vehicle to smuggle tin ore into Malaysia. As the bus was no longer with the first defendant, it was futile for the plaintiff to repossess the bus under s. 16 of the Hire Purchase Act 1967. In the event, the plaintiff did not take any further action to repossess the bus under the Act.

Subsequently, on 16 January 1989 an order was issued out of the magistrates' court at Jitra in Kedah for the bus to be confiscated and handed over to customs.

The plaintiff in its amended statement of claim states:

> 6. In consideration of the Plaintiff agreeing to deliver to the 1st Defendant the said goods and in consideration of the Plaintiff agreeing to enter into the said Hire Purchase Agreement with the 1st Defendant, the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th Defendants by the said Guarantee Agreement agreed to undertake and guarantee the payment by the 1st Defendant of all sums of monies which may become payable by the 1st Defendant under the terms of the said Hire Purchase Agreement and due performance and observance by the 1st Defendant of the stipulations and conditions therein contained. The 2nd, 3rd, 4th, 5th, 6th, 7th, 8th Defendants further agreed, *inter alia*, that the undertaking given in the said letter of Guarantee and Indemnity are their primary obligation and that their obligations are unconditional irrespective of any invalidity, irregularity or unenforceability of or defect in any provision of the said Hire Purchase Agreement. Notwithstanding the Guarantee given the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th Defendants further agreed to grant the Plaintiff a complete Indemnity and will reimburse or demand for all losses, damages, costs and disbursements suffered by the Plaintiff.
>
> 7. ...
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> 8. The 1st Defendant had breached the terms of the said Hire Purchase Agreement by defaulting on the payment of rentals when such rentals fell due for payment. By its default of payment, the 1st Defendant has also repudiated the said Hire Purchase Agreement and it is thereby terminated. The 1st Defendant had also breached the said hire purchase agreement when *(sic)* are subject matter of the said Hire Purchase Agreement i.e. 1 unit of luxury Air-Conditioned Coach Bus was confiscated *vide* Kes Tangkapan No. 86-10-89 by the Magistrate Court Jitra of Kedah Darul Aman.

9. **PARTICULARS OF OUTSTANDING DUES**

Hire Purchase Agreement No. HP 308A/ETT 1 dated 25.2.85:-

Total payable		M$239,200.00
Less Amount Paid	M$33,222.50	
Interest Rebate	M$21,463.98	54,685.50
		M$184,514.50
Add Overdue Interest as at 31-10-86	10,893.10	10,893.10
Total		M$195,407.60

10. As the result of the 1st Defendant's breach of contract and wrongful determination of the said Hire Purchase Agreement, the whole of the sums of M$195,407.60 together with interest at 8% per annum arising from the said Hire Purchase Agreement become immediately due and payable.

At the trial, the plaintiff obtained judgment against the appellant. Hence the appeal.

It is pleaded in para. 8 of the statement of claim that the first defendant by defaulting on the payment of the monthly instalments had terminated the hire purchase agreement. It reads:

8. The 1st Defendant had breached the terms of the said Hire Purchase Agreement by defaulting on the payment of rentals when such rentals fell due for payment. By its default of payment, the 1st Defendant has also repudiated the said Hire Purchase Agreement and it is thereby terminated.

Even if the first defendant had repudiated (that is to say "refused to perform") the agreement "in its entirety" by refusing to pay at all any further rental instalments, (as a matter of contract law) that would not have terminated the agreement. In this case it is only the plaintiff who has the right to terminate the agreement. Put in another way, the plaintiff could elect to treat the contract as at an end by accepting the repudiation and terminating the contract. See s. 40 of the Contracts Act 1950 which reads:

40. When a party to a contract has **refused to perform,** or disabled himself from performing, **his promise in its entirety,** the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. (We have supplied the emphasis)

ILLUSTRATIONS

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her $100 for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre to sing at his theatre two nights in every week during the next two months, and B engages to pay her the rate of $100 for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

In the present case, the first defendant had disabled itself from performing its agreement in its entirety by losing the bus to the authorities. Even this fact would not mean that the first defendant had terminated the hire purchase agreement. Section 40 of the Contracts Act gives to the plaintiff (that is, the promisee) the right to elect to terminate the agreement and recover damages under s. 76 of the Act or to treat the agreement as alive and continuing.

In other words, the plaintiff could either accept the repudiation by terminating the agreement or he could ignore the breach by treating the contract as alive and subsisting. As a matter of fact as well as on the pleadings the plaintiff did not terminate the contract despite the repudiation by the first defendant so that the contract is still subsisting.

In fact, the only way under the Hire Purchase Act for a hirer to determine the agreement ahead of time, that is before all the instalments have been paid up, is to return the goods (in the instant case, it was the bus) to the owner under s. 15(1) of the Act. The section gives a hirer the right to terminate the agreement. It reads:

15.(1) The hirer of any goods comprised in a hire-purchase agreement may terminate the agreement by returning the goods to the owner during ordinary business hours at the place at which the owner ordinarily carries on business or to the place specified for that purpose in the agreement.

Since it was not possible to return the bus to the plaintiff, the agreement could not be terminated by the first defendant. Based on the cause of action as pleaded in the statement of claim, the plaintiff's claim as owner against the first defendant (hirer) was unsustainable.

In fact, had the agreement been terminated by the hirer returning the goods to the owner (but, on the evidence and on the pleadings this was not the case here), the owner was only entitled to claim against the hirer the balance outstanding under the hire purchase agreement less the value of the goods at the time when it was returned to the owner (see s. 15(5)(c)). For the meaning of "balance outstanding under the hire-purchase agreement" and "value of the goods at the time when it is returned to the owner" see s. 15(6). In other words, if the goods had come into the owner's possession (by the hirer returning it so as to terminate the agreement), the owner would have to give credit for any amount that was realised for the sale of it. In the present case this would mean that the amount that the plaintiff could claim against the first defendant would not be the amount claimed in the statement of claim. Likewise this would also apply to the claim against the appellant as guarantor because (to use the words of Holroyd Pearce, LJ in *Yeoman Credit Ltd v. Latter* [1961] 2 All ER 294 at 296). "a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promisee." See also s. 79 of the Contracts Act which says that a contract of guarantee "is a contract to perform the promise, or discharge the liability, of a third person in case of his default." But, according to the terms of the guarantee agreement in the present case before the guarantor can be made to answer for the debt of the hirer, the following condition precedent must be complied with. It is this. If the agreement had been terminated by the hirer returning the goods (which is not the case here), the owner must give fourteen days written notice to the guarantor to buy the goods from the owner by paying in full the full sum due to the owner. See proviso (a) to cl. 1 of the guarantee which reads:

> PROVIDED ALWAYS THAT
>
> (a) in the event of the termination of the said agreement and repossessing the goods or any of them by the owner the owner will give the guarantor fourteen (14) days' notice in writing of the owner's intention to transfer the same to the guarantor upon payment by the guarantor in full of his liability hereunder within the said period of fourteen (14) days;

If this opportunity to purchase the goods is not given to the guarantor, the claim by the owner against the guarantor will fail. Compliance with the proviso is a condition precedent to exercising the rights relied on by the owner against the guarantor.

We return now to the instant case. As we have explained earlier, the first defendant did not terminate the hire purchase agreement by returning the bus. Section 15 of the Hire Purchase Act gives a right to the hirer to terminate hire purchase agreements ahead of time by returning the goods. Therefore, since the first defendant did not terminate the agreement, there was no liability of the hirer that was revealed in the statement of claim for the appellant to guarantee or make good. Under the terms of his guarantee the appellant in no circumstances was under any liability to do so.

In the present case, as the hire purchase agreement was still subsisting since the plaintiff did not determine it (under s. 40 of the Contracts Act) or repossess the bus (under s. 16 of the Hire Purchase Act) nor did the first defendant return it to the plaintiff (under s. 15 of the same Act), the plaintiff has the right still to recover instalments due under the agreement. Unfortunately for the plaintiff, there was no claim for arrears of instalments in its statement of claim. Therefore, as the plaintiff did not claim for arrears of instalments against the first defendant, there was no liability of the first defendant (hirer) for the appellant (guarantor) to make good under the terms of his guarantee.

Finally, was there a claim against the appellant for an indemnity? Paragraph 6 of the statement of claim alleges that the appellant has agreed to indemnify the plaintiff against any loss that the plaintiff might sustain as a result of the venture. The relevant part of cl. 21 of the guarantee and indemnity agreement reads:

> ... Notwithstanding the above, in the event that, for any reason whatsoever, this guarantee is or becomes or proves to be unenforceable, we hereby grant to you a complete indemnity and will reimburse you on demand for all losses, damages, costs and disbursements suffered by you as a direct or indirect result of such unenforceability and as a result of the hirer under the hire purchase agreement.

Shortly stated, "An indemnity is a contract by party to keep the other harmless against loss"; see per Holroyd Pearce LJ in *Yeoman Credit Ltd v. Latter (supra)* at p. 295. See also s. 77 of the Contracts Act which describes a contract of indemnity as "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person."

The short answer is that in the statement of claim there was no claim for the plaintiff to be indemnified by the appellant for the loss of the bus to customs. Instead, (apart from alleging that there was an indemnity clause in the guarantee and indemnity agreement) the plaintiff pleaded a different cause of action which we have found to be quite unsustainable. In fact, the plaintiff

did not even plead as a cause of action for the appellant to see the plaintiff harmless for the loss of the bus and, on the evidence the plaintiff did not even try to make out such a case against the appellant.

On the facts and on the statement of claim, the action against the appellant should have been dismissed. In the result, we have allowed the appeal with costs here and in the court below.